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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 791

J. CARTER MILLER,
Petitioner (Intervenor),

vs.

SCOTT CUTHILL,
Respondent (Plaintiff),

ORTMAN-MILLER MACHINE COMPANY,
a Corporation,
Respondent (Defendant).

Petition for Writ of Certiorari to the Court of Appeals For the Seventh District.

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Petition for Writ of Certiorari to the Court of Appeals For the Seventh District.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

J. Carter Miller respectfully petitions for a writ of certiorari directed to the Court of Appeals for the Seventh Circuit to review a judgment of that court, rendered on October 16th, 1957, in an appeal from a judgment of the District Court for the Northern District of Indiana, Ham-

mond Division, and also to review an order of the aforesaid Court of Appeals denying leave to file an independent application and petition to vacate the decision of October 16th, 1957, because of collusion between the parties and fraud practiced upon the Court of Appeals, and alleges:

(a)

The opinion sought to be reviewed is reported unofficially in the Advance Sheets for December 30th, 1957:

Cuthill v. *Ortman-Miller Machine Co. and J. Carter Miller*, 249 F. 2d—No. 1, page 43.

and is reprinted at pages 1a, thru 10a infra. The opinion of the Court of Appeals in an earlier appeal in the same case, *Cuthill* v. *Ortman-Miller Machine Co. and J. Carter Miller, Intervenor,* (CA 7, 1954) 216 F. 2d 336, is reprinted at page 26 of the record filed pursuant to Rule 21 (4). The opinion of the District Court (Northern District of Indiana) is printed at page 5 of the same record.

(b)

Your petitioner invokes the jurisdiction of this Court by showing:

(i) The judgment of the Court of Appeals is dated October 16th, 1957, and was entered on the same day.

(ii) A timely petition for rehearing was filed on October 31st, 1957, and rehearing was denied November 18th, 1957. Petitioner's independent application and petition to vacate the opinion and decision of October 16th, 1957, was tendered for filing on November 6th, 1957. Leave to file the same was denied on November 18th, 1957.

(iii) The statutory provisions conferring jurisdiction to review the judgment and order in question by writ of certiorari are: 28 U.S.C.A. 2101 (c) and 28 U.S.C.A. 1254 (1).

(c)

Questions Presented for Review.

1. **Did the Court of Appeals for the Seventh Circuit have the jurisdictional power and a duty to inquire into and remedy a fraud practiced upon it through the collusion of the original parties to the litigation when the fraud and collusion were formally called to its attention by the injured person (whose right to intervene and become a party had been denied as a result of the collusion)?**

This Honorable Court, in **Hazel-Atlas Co.** v. **Hartford Empire Co.**, (1944) 322 U.S. 238; 64 S. Ct. 997; 88 L. Ed. 1250 and **Universal Oil Products Co.** v. **Root Refining Co.**, (1946) 328 U.S. 575; 66 S. Ct. 1176; 90 L. Ed. 1447, decided an important question of federal law: that Courts of Appeals have the power and duty to investigate into, at the instance of the losing party, and remedy a fraud practiced upon them by the successful party. An equally important question of federal law, which should be settled by this court, is whether Courts of Appeals have a like power and duty where the injured person is not a party to the litigation and seeks the remedy and relief recognized as available to a party. In the instant case, the actual parties to the litigation (plaintiff and defendant in the District Court and co-appellees in the Court of Appeals), while assuming to act as adversaries according to the forms of law, colluded and connived, both in the District Court and in the Court of Appeals, to procure and maintain a judgment in favor of one and against the other which seriously affects the rights of a third person. The third person, petitioner J. Carter Miller, was denied the right to intervene by the District Court. The Court of Appeals, at the instance of the plaintiff and the defendant below, affirmed the order denying intervention. Petitioner Miller, while the case remained in fieri in the Court of Appeals, sought leave to file a petition invoking the jurisdiction of the Court of Appeals to investigate into and eradicate the

fraud and collusion which resulted in the decision of the District Court and the affirmance on appeal. The Court of Appeals erroneously refused to grant petitioner leave to file the petition. (See Order, Appendix, page 30a)

2. Did the Court of Appeals for the Seventh Circuit sanction such a departure from the accepted and usual course of judicial proceedings by the District Court to call for an exercise of this court's power of supervision?

Your petitioner, J. Carter Miller, was and is seeking to enjoin the officers of, and attorney for, the respondent-defendant corporation from maliciously destroying and appropriating his independent business, Midwest Supply Company, and to obtain damages for injuries already done to this business. The litigation was and is pending in the state courts of Indiana. (See, for example, *Miller, etc.* v. *Ortman, etc., et. al.*, (1956) 235 Ind. 641; 136 N.E. 2d 17, reprinted in the record filed under Rule 21(4) at pages 55-98.)

Miller's office manager, Scott Cuthill, plaintiff-respondent herein and a key witness in the state court litigation, was induced to file the present action in the District Court by one Straley Thorpe, the attorney for Ortman-Miller Machine Company, defendant-respondent. (Thorpe was and is, himself, a defendant in the state court litigation.) On December 21st, 1953, although assuming to act for the defendant corporation, Thorpe collaborated in procuring the judgment in plaintiff Scott Cuthill's favor and against his client, depositing the proceeds of the judgment with the Clerk of the United States District Court on the day the judgment was obtained. (On the face of the record the proceedings were adversary.)

Petitioner Miller, former President and owner of 1/5 of the corporate stock in the defendant corporation, sought to intervene, vacate the judgment and defend, on the

corporation's behalf, against his former office manager's claim. He alleged, under oath, that the filing of the suit, the rendition of judgment, and the payment of it were merely a means and method of rewarding Scott Cuthill for his services as a key witness against him in the state court litigation involving the destruction of his independent business, Midwest Supply Company.

It is significant that the attorney for the respondent-defendant, Thorpe, joined with the plaintiff's attorney in preventing intervention and a vacating of the judgment rendered by the District Court. At the hearing on petitioner Miller's application to vacate the judgment, the attorneys for the plaintiff and defendant were permitted by the District Court to collaborate (through joint objections to your petitioner's questions, claims of privilege, and friendly cross-examination of each other's witnesses) in preventing an investigation into the alleged abuse of the jurisdiction and processes of the Federal Court. This was allowed on the theory that their clients were adversaries of record.

Again, they actively joined in obtaining the affirmance on appeal.

3. Did the Court of Appeals for the Seventh Circuit erroneously affirm the District Court's denial of petitioner J. Carter Miller's right to intervene and defend on behalf of respondent Ortman-Miller Machine Company, in contravention of and in conflict with the applicable decision of this court in Price v. Gurney, et al., (1945) 324 U. S. 100, 105, 65 S. Ct. 513, 516?

Petitioner Miller, as owner of 1/5 of the corporate stock in respondent-Ortman-Miller Machine Company, petitioned for leave to intervene, vacate the judgment, and defend **the day after the judgment was entered.** (No defense was offered by the corporation's attorney when the cause was

submitted the previous day). There was no change in position of the parties in 24 hours. The District Court first struck out the petition, and, in the initial appeal, the Court of Appeals reversed, determining that petitioner Miller was entitled to intervene in the litigation as of right. *Cuthill v. Ortman-Miller Machine Company and J. Carter Miller, Intervenor,* (1954) 216 F. 2d 336 (Reprinted in the Record filed under Rule 21(4) at page 5.) On remand, although it was stipulated by the parties that Miller owned 1/5 of the corporate stock and, consequently, had a direct financial interest in the subject matter of the litigation under Federal Rules of Civil Procedure 24 (a) and (b), intervention was denied. The decision was affirmed on the second appeal.

(d)

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in the case.

(e)

Concise Statement of the Case.

On January 28, 1952, your petitioner was the President, a director, and owner of 1/5 of the corporate stock in a successful manufacturing company, respondent-defendant Ortman-Miller Machine Company. He was, likewise, owner of a sole proprietorship, Midwest Supply Company, which was, and had been since February of 1948, a distributor of the product (hydraulic cylinders) of Ortman-Miller Machine Company. Respondent Scott Cuthill (plaintiff in the District Court) was office manager of Midwest Supply Company. One Straley Thorpe was attorney for Ortman-Miller Machine Company. One Clarence Harney, a lawyer and certified public accountant, was the external auditor for both Midwest Supply Company and Ortman-Miller Machine Company.

While petitioner Miller was on vacation in Florida, attorney Thorpe called the remaining directors of Ortman Miller Machine Company into his office for a conference on the night of Thursday, February 14, 1952. The same parties met again in Thorpe's office with the lawyer-auditor, Clarence Harney, on Sunday morning, February 17th, 1952. At these secret meetings, the plan, scheme, and conspiracy to destroy and appropriate Midwest Supply Company, with $600,000 gross income per year, were formulated.

Respondent Cuthill joined the conspiracy by furnishing the names and addresses of the dealers and sales representatives of Midwest Supply Company (of which he was office manager) to Thorpe and Harney so that they could be contacted by telegraph and mail. In addition, he aided and abetted the defense during the trial of the injunction suit brought by Miller in the state court. He signed an affidavit prepared by Thorpe, in opposition to petitioner Miller's motion for a new trial. Thorpe and his co-defendants were successful in the trial court and the Appellate Court of Indiana. These decisions were reversed, however, by the Supreme Court of Indiana in July of 1956. *Miller, etc.* v. *Ortman, etc.*, (1956) 235 Ind. 641; 136 N.E. 2d 17, (Record, page 55.)

After the motion for a new trial was overruled in the state court injunction suit, Cuthill, at the instance and suggestion of Thorpe and Harney, (who had received in excess of $100,000 in fees out of the corporate treasury for their activities in the conspiracy) on June 2, 1953, filed a Fair Labor Standards Act complaint in the United States District Court for overtime wages allegedly due him as a former employee of Ortman-Miller Machine Company. This suit was predicated upon a fictitious memorandum of alleged overtime hours compiled from a 1951 insurance calendar in Clarence Harney's office.

Thorpe, on behalf of respondent-defendant Ortman-Miller Machine Company, filed an answer denying the material allegations of the complaint. He also filed sworn answers to interrogators alleging that Cuthill was not employed by Ortman-Miller but by Clarence Harney. When the case was submitted for hearing in the District Court in Hammond on December 21, 1952, Thorpe offered no defense. He urged the District Judge to enter judgment against his client and had a check ready to pay the judgment. The intent to conceal the true character of the judgment is best shown by the following significant colloquy between the District Judge and Thorpe (copied down by the Court Reporter):

> "**The Court**: I don't know what your viewpoint is. Under the Fair Labor Standards Act, as I understand it under the present law, you can settle your differences, and if that be true, it seems to me that if you have agreed on a judgment that ends it. If you have a prepared form, I will sign it.
>
> **Mr. Thorpe**: I would like to say this, your Honor: This Company has been confronted with numerous lawsuits, with some pretty bad charges, **and I am confronted with a situation where I just can't stipulate the facts. I can go along with this; I want this man to be paid; and I can determine pretty well what the amount is.**
>
> **I should like, if it is not asking too much, that the record should show that there was evidence heard and that the Court made a finding on this; if it is not asking too much, I should like that, because I might be confronted somewhere with the statement that I had agreed to this judgment.** I would rather, if we could, do it that way, if it is not an imposition upon your Honor.
>
> **The Court**: It is not an imposition, except that I am in the midst of an injunction suit, and I had no idea that we were going to have another trial in the midst of this other matter. I was under the impression that it was an agreed matter.

Mr. Thorpe: I think that he (Burkey, plaintiff's attorney) could ask his client half a dozen questions, and have it over with."

* * *

"**The Court:** It is not a matter of not wanting to hear you; it is just getting into this kind of a situation when I don't anticipate it, and I don't feel that it is fair to the case we are trying to break in and try another case.

Mr. Thorpe: I appreciate your Honor's position on it. If it were not for the position that I have been placed in with this company I would have no hesitancy, but just as sure as the world, if there was anything that would indicate that I was agreeing to the judgment I might be confronted with something."

* * *

"**Mr. Thorpe:** Could we do this: Show a submission, and the statement of counsel is substantially correct, there isn't any question about that, and it is a matter of computation as to what the amount is, and we are in agreement on that. **I was just wondering, would that be embarrassing to the Court, or might it be a suggestion that you could not follow, in other words, show a submission, and a judgment against us?**

The Court: What do you think? I will get your viewpoint on it.

Mr. Thorpe: I think that would be all right, by showing a submission. The complaint speaks for itself, and, for that matter, it could be introduced in evidence, as far as we are concerned.

The Court: Well, you can go ahead; if we can get the indulgence of counsel here for a little while, you can go ahead and submit whatever evidence you have.

Mr. Burkey: I would like to call Scott Cuthill as a witness."

* * *

(Thereupon, Cuthill testified without being cross examined and the Court signed a form of judgment which

indicated on its face that the Judge found in favor of the plaintiff in an adversary trial.)

The following day, December 22, 1953, your petitioner, as an intervenor, owning 20% of the corporate stock in the defendant corporation, filed his "Petition for Leave to Intervene, Vacate Consent Judgment and Defend on Behalf of the Defendant Corporation." On January 6, 1954, plaintiff-respondent, Scott Cuthill, filed his "Motion to Strike and Dismiss" the petition of J. Carter Miller. The motion to strike and dismiss was submitted to the court and sustained on January 28, 1954 on the ground that the charges of fraud were not alleged with sufficient particularity. Thereupon, and on January 30, 1954, petitioner filed his "Amended Petition for Leave to Intervene, Vacate Consent Judgment and Defend on Behalf of the Defendant Corporation." Plaintiff-respondent Scott Cuthill, on February 10, 1954, filed his second "Motion to Strike and Dismiss" the amended petition. On April 15, 1954, the District Court again sustained plaintiff-respondent's motion to strike and dismiss the amended petition, this time on the ground that, as a stockholder, he had no standing to question the judgment.

Intervenor Miller appealed to the Court of Appeals, Seventh Circuit, from the order of April 15, 1954, and a reversal was entered on October 14, 1954, with an opinion by the late Judge Walter Lindley. *Cuthill* v. *Ortman-Miller Machine Company and J. Carter Miller, Intervenor*, Cause No. 11184, (1954) 216 F. 2d 336, Record, page 26.

On remand, counsel for plaintiff and defendant openly joined in an effort to prevent inquiry into the judgment. A reply in admission and denial was filed by plaintiff in answer to the Amended Petition for Leave to Intervene. Subsequently, the plaintiff filed a Reply of Res Adjudicata based upon an Indiana Appellate Court opinion furnished

by Thorpe. Respondent-defendant Ortman-Miller Machine Company, through Thorpe, likewise filed an answer claiming Res Adjudicata based on the same opinion. With the Reply and Answers of Res Adjudicata, the plaintiff and defendant tendered the opinion of the Appellate Court of Indiana under date of February 14, 1955, in an appeal entitled *J. Carter Miller, etc.* v. *Alva Ortman, et al.*, (1955) 124 N.E. 2d 390; 125 N.E. 2d 257 (subsequently vacated by the Supreme Court of Indiana).

On the issues formed by the amended petition for leave to intervene and the responsive pleadings hereinbefore described, the cause was submitted to the District Court for determination without the intervention of a jury on February 28, 1955, and evidence heard for one week, at which time the cause was taken under advisement.

Clarence Harney, put on the stand by defendant's attorney, Thorpe, as the defendant's witness, testified, over Miller's objection, in favor of the merits of plaintiff Cuthill's claim (although the merits were not and could not be in issue until the judgment was vacated and the case heard on the merits). Significantly, all of the purported overtime work, as the opinion of the District Court indicates, was allegedly performed in the presence of Clarence Harney, in Harney's office, far from the Ortman-Miller plant. No work product was or could be produced. Further, respondent Cuthill, as an office manager and administrative man, doesn't fit into the category of a laboring man which the Fair Labor Standards Act was designed to protect. Again, Cuthill never demanded overtime pay of anyone at Ortman-Miller, the suit being filed 1½ years after the last date shown on the fabricated memorandum.

Intervenor Miller's amended petition was denied on August 29, 1955, the court, in its memorandum opinion, expressly relying, in part, on the purported adjudication

by the Appellate Court in 124 N.E. 2d 390, supra. (See Record filed pursuant to Rule 21(4), page 11.) Within 10 days intervenor Miller filed a Motion for a New Trial and Motion for Amendment of Opinion to Include Omitted Findings. Submission of the motions was withheld pending the determination of a petition to transfer the case of *J. Carter Miller* v. *Alva Ortman, et al.*, (1955) 124 N.E. 2d 390, supra, by the Supreme Court of Indiana. The Supreme Court of Indiana, on July 12, 1956, granted transfer, vacated the Appellate Court opinion, and reversed the trial court with a thirty-seven page written opinion. *Miller* v. *Ortman, et al.*, (1956)235 Ind. 641; 136 N.E. 2d 17. (Record, pages 55-98.) Notwithstanding the favorable decision of the Supreme Court of Indiana vacating the opinion relied on by the plaintiff, defendant, and the District Court in its opinion of August 29, 1955, the motions for new trial and to amend findings were denied on November 30, 1956. Your petitioner appealed to the Court of Appeals, Seventh Circuit, for the second time.

After the adverse decision of the Court of Appeals for the Seventh Circuit (which your petitioner seeks to have reviewed), your petitioner filed a petition for rehearing on October 31, 1957. The Court of Appeals having affirmed the District Court's denial of petitioner Miller's right to become a party to the litigation, petitioner Miller tendered for filing his "Independent Application and Petition * * * to Vacate Opinion and Decision of October 6, 1957, Because of (1) Collusion between Plaintiff Scott Cuthill and former Defendant's Attorney, Straley Thorpe, and (2) Fraud Practiced upon this Court". The tendered petition is reprinted hereinafter at pages 11a through 21a of this petition. It is filed with this Honorable Court with the record. Leave to file the same was denied by order of Court entered on November 18, 1957. The order is reprinted hereinafter at page 30a.

The District Court predicated its decision on the alleged merits of Cuthill's claim as described in the testimony of Cuthill, one of Cuthill's lawyers (Sullivan), called by the District Judge as the Court's witness and the testimony of Clarence Harney (put on the stand by Thorpe, counsel for the fictitious adversary). Record, page 5. Not only were the merits of Cuthill's claim not in issue but the judgment of December 21, 1953, necessarily prevented the real adversary, petitioner Miller, from contesting the merits of the claim. **(The Court of Appeals affirmed on the ground that there was evidence to sustain the findings of the District Court—a question which petitioner Miller did not raise or present on appeal.)**

The circumstances under which the fraud, initiated in the District Court and consummated in the Court of Appeals, was perpetrated are particularized in the "Independent Application and Petition, etc." which the Court of Appeals refused to entertain, Appendix, page 12a.

Initial Jurisdiction in the District Court.

Respondent-plaintiff Scott Cuthill invoked jurisdiction by filing an overtime wage claim under the "Fair Labor Standards Act of 1938," 29 U.S.C.A. 201-219 inc. 29 U.S.C.A. 216(b) creates the action. Because the "Fair Labor Standards Act of 1938" is a law regulating interstate commerce, the District Court had original jurisdiction by virtue of 28 U.S.C.A. 1337.

(f)

Concise argument amplifying the reasons relied on for the allowance of the writ.

(1) The Court of Appeals had the jurisdictional power and was under a duty to investigate into and purge itself of a serious fraud upon the court. The refusal to grant leave to file the "Independent Application and Petition of J. Carter Miller, etc." permitted a consummation of that fraud.

Point: (1). Tampering with the administration of justice is a matter of great public concern. Using the jurisdiction and process of a federal court as a means and device for putting money into the hands of a state court witness is an unprecedented debasement of the federal system of administration of justice. This Honorable Court will not permit the rendition of such a judgment by a Federal District Court to be used in aid of a fraudulent scheme and conspiracy. *Hazel-Atlas Glass Co.* v. *Hartford Empire Company* (1944) 322 U.S. 238, 64 S. Ct. 997. *Marshall* v. *Holmes* (1891) 141 U.S. 589; 12 S. Ct. 62. *Winslow* v. *Staab* (1917) 242 F. 426. *General Excavating Co.* v. *Keystone Driller Co.*, (1932) 62 F. 2d 48.

Point (2). The rehearing petition was not ruled upon until November 18, 1957. When the "Independent Application and Petition of J. Carter Miller, etc." was tendered on November 6, 1957 the proceedings were "in fieri." The Court of Appeals had full jurisdiction to entertain the petition. The jurisdiction was based upon the inherent power of the court to protect itself against a fraud. *Hazel Atlas Co.* v. *Hartford Empire Company*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250; *Universal Oil Products Company* v. *Root Refining Co.*, (1946) 328 U.S. 575, 66 S. Ct. 1176; *Tyler* v. *Maguire*, 17 Wall. 253, 283, 21 L. Ed. 576; *United States* v. *Throckmorton*, 98 U.S. 61, 25 L. Ed. 93;

Art Metal Works, Inc. v. *Abraham & Strauss, Inc.*, 2 Cir., 107 F. 2d 940 and 944; *Publicker* v. *Shallcross*, 3 Cir., 106 F. 2d 949, 126 A.L.R. 386; *Chicago, R. I. & P. Ry. Co.* v. *Callicotte*, 8 Cir., 267 F. 799; *Pickens* v. *Merriam*, 9 Cir., 242 F. 363.

Point (3). Having been denied the right to intervene, and having been precluded from contesting the merits of the claim by the original judgment of the District Court rendered on December 21, 1953 and the affirmance of the Court of Appeals of the order denying intervention, there was no other remedy available to petitioner than to file an "Independent Application and Petition, etc." setting out the documents which conclusively exposed the perpetration of the fraud on the court by the parties to the litigation and which resulted in the decisions consummating the fraud. Refusal to grant leave to file the petition can only be construed as a determination that the Court of Appeals was without jurisdiction to entertain the same because your petitioner was a stranger to the litigation. The jurisdictional power and duty to investigate fraud on the court is not subject to this limitation.

Point (4). An inspection of a photostatic copy of the actual time sheet copied from Harney's 1951 insurance calendar by Cuthill, and which was furnished to Attorney Burkey to enable him to draft the complaint, appears as Exhibit "A" attached to the Independent Application filed as part of the Record under Rule 21, paragraph 4. A physical inspection of this document is important to an understanding of how the figures mentioned in the Court of Appeals opinion were arrived at.

(2) The departure from the accepted and usual course of judicial proceedings by the District Court, as sanctioned by the Court of Appeals, calls for an exercise of this court's power of supervision to prevent the consummation of a fraud on the court.

Point (1). The existence of truly adversary parties is the foundation upon which the administration of justice rests. Collusive arrangements between parties in litigation, presumed to be adverse, are always injurious to the integrity of the court. *Lord* v. *Veazie* (1850) VIII Howard 249, 251, 12 L. Ed. 1067; *Cleveland* v. *Chamberlain* (1862) 1 Black 419, 17 L. Ed. 93, 66 U.S. 93; *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 20 S. Ct. 311, 314, 44 L. Ed. 423; *United States* v. *Johnson* (1943) 319 U.S. 302, 63 S. Ct. 1075; *In re*: *Insull Utility Investments* (1933) 6 F. Supp. 653.

Point (2). Where it appears that the Court of Appeals has failed to act in the face of collusion, this Honorable Court will not hesitate to exercise its supervisory functions "to see that the waters of justice are not polluted." *Mesarosh* v. *United States*, 352 U.S. 1, page 14, 77 S. Ct. 1, page 8, 1 L. Ed. 2d 1; *McNabb* v. *United States*, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819; *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U.S. 115, 76 S. Ct. 663, 100 L. Ed. 1003; *United States* v. *The Shotwell Mfg. Co.* (1957) 78 S. Ct. (No. 4) 245.

Point (3). Respondent Ortman-Miller Machine Company was prevented from exhibiting its defense on December 31, 1953 because of the collusion between plaintiff-respondent Cuthill and the respondent company's then attorney, Thorpe. *United States* v. *Throckmorton*, 98 U.S. 61, 25 L. Ed. 93. A wrong result and probable error are obvious on the face of the opinion. Because of continued collusion between the plaintiff and defendant, (co-appellees on ap-

peal) petitioner's right to intervene and have the judgment vacated was frustrated.

Regardless of the fact that the majority of the board of directors of the respondent corporation determined, in collusion with the plaintiff, to take active steps to ratify and protect the fraudulent judgment, the integrity of the Court of Appeals necessitates the exercise of this court's supervisory power.

(3) The decision and opinion of the Court of Appeals contravenes an important precedent of this court: Price v. Gurney, et al. (1945) 324 U.S. 100, 105, 65 S. Ct. 513, 516.

Point (1). *Price* v. *Gurney, et al.*, supra, at page 105, holds:

> "Similarly, if a corporation has a defense to an action against it and is not asserting it, a stockholder may intervene and defend on behalf of the corporation."

The opinion of the Court of Appeals discloses, on its face, that the corporation had a good defense which its attorney, Thorpe, did not assert on December 21, 1953 when the judgment was entered. The opinion also reveals that Miller owned 1/5 of the corporate stock of the corporation. Intervention should have been permitted.

Point (2). Petitioner Miller had a right to intervene even after judgment. His application was timely, having been filed within 24 hours after the judgment. Rule 24(a) and (b) of the Rules of Civil Procedure; *Hawes* v. *City of Oakland*, 104 U.S. 450; *Pellegrino* v. *Nesbit, et al.*, 203 F. 2d 463 (C.A. 9), page 465; and *Cuthill* v. *Ortman-Miller* (C.A. 7, 1954), 216 F. 2d 336. (Intervention would have permitted Miller to appeal from the judgment for errors of law, even if his application to vacate the same was denied.)

Point (3). Because Miller did not know of the rendition of the judgment until after it was entered and there was no change of position between the parties to the judgment when the application was filed there could be no reason for denying Miller's right to intervene.

Point (4). That the District Judge was aware of Miller's right to intervene under the law of the case, after reversal and remand, is shown in the opinion of the District Court: "The Court of Appeals reversed the ruling of this court granting the motion to strike, and **held that Miller's petition to intervene should have been allowed, etc.**" Record filed under Rule 21, par. 4, page 9. Nevertheless, the amended petition was denied in toto.

SUMMARY.

The opinion below shows plainly that the Court of Appeals was wrong with respect to its conclusions.

A court has inherent power and duty to vindicate and protect its existence and powers, and where a fraud upon it resulted in a decision of importance not only to the parties and to the intervenor (the petitioner herein), but to the public generally, as is true of a fraudulent use of the courts to pay off a witness, the court has the power and duty to set aside the fraudulently obtained undefended judgment.

The fraudulent collusion of the two parties poisoned the minds of the district and circuit judges with the intended result that they disregarded the clear defense asserted by the injured intervenor (the petitioner herein), disregarded the clear evidence of collusion and fraud, and denied the right to intervene, refused to vacate the undefended judgment, and refused to permit a trial on the merits. This plainly appears from the reading of the opinions of both courts.

The petition for writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

/s/ Owen W. Crumpacker,
/s/ Benjamin Wham,
Counsel for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
No. 11985
September Term and Session, 1957

Scott Cuthill,
Plaintiff-Appellee,
v.
Ortman-Miller Machine Company,
Defendant-Appellee,
and
J. Carter Miller,
Intervenor-Appellant.

October 16, 1957.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.

Before FINNEGAN and SCHNACKENBERG, *Circuit Judges*, and PLATT, *District Judge*.

PLATT, *District Judge*. Appellee, Scott Cuthill, on December 21, 1953 obtained a judgment against the appellee, Ortman-Miller Machine Company, a corporation, for $4,100.00 for overtime compensation in a suit based upon the Fair Labor Standards Act. 29 U.S.C.A. §201 *et seq.* On the next day the appellant, J. Carter Miller, a minority stockholder in Ortman-Miller filed a petition to intervene, vacate the judgment and defend upon behalf of Ortman-

(Appendix)

(Page 2)

Miller alleging that the judgment was a fraud upon the court in that Cuthill did not have a valid claim for overtime, and that Ortman-Miller's counsel was aware of this. The district court allowed a motion to dismiss the intervening petition. Miller appealed and the order of dismissal was reversed and remanded in *Cuthill* v. *Ortman-Miller Machine Company,* 216 F. 2d 336 (C.A. 7, 1954). Since the allegations of the petition to intervene are set forth in that opinion it is not necessary to repeat them here.

Evidence was heard by the trial court upon the allegations in the intervening petition, and the court made findings of fact, conclusions of law and ordered the prayer of the petition denied. Miller has again appealed and maintains:

1. That the prior decision of this court entitled him to defend for the Company and have the judgment vacated as a matter of right.
2. That in the event the district court had discretion to determine whether the judgment should be vacated, the district court abused such discretion because the evidence offered substantiated the allegations of the petition.

The opinion of this court on the prior appeal explicitly held that Miller was entitled to a hearing on his petition to intervene, but it did not thereby order the judgment vacated and a defense to be made. Judge Lindley, speaking for this court, said, 216 F. 2d at p. 339:

> "Inasmuch as Rule 60(b) endows the court with power to vacate any fraudulent judgment, plaintiff was entitled to be heard upon his averments. Obviously the District Court has inherent power to investigate such averments of fraud."

(Appendix)

In the concluding paragraph of the opinion it was stated:

> "We know not what proof appellant may be able to produce, but we are of the opinion that he should be permitted to intervene and have his day in court. The order is reversed with directions to proceed accordingly."

Counsel for Miller, in spite of their contention, must have understood that they were required to prove the allegations of their petition, since the following statement was made to the trial court:

> "the Circuit Court of Appeals in determining the law of this case, on the very facts that are the subject of inquiry here, has held that if the matters in the intervening petition are true, and if the intervenor can
>
> *(Page 3)*
>
> prove those things, a fraud has been perpetrated on the United States District Court of Indiana of a rather vicious nature."

This brings forward the real issue. Appellant contends that the trial court abused its discretion in denying him relief, because the evidence substantiated the allegations of fraud. The obvious question on appeal is whether there was substantial evidence presented on the hearing of the petition to intervene upon which the trial court's findings of fact can be sustained. Findings of fact by the district court will not be set aside on appeal unless clearly erroneous. Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.A. *Koehler* v. *Ellison*, 226 F. 2d 682 (C.A. 7, 1955).

The undisputed evidence discloses that Miller, at the time the judgment in question was entered, owned 20% of the stock of Ortman-Miller Machine Company. The remaining stock was owned by Carl Speichert, Alva Ortman, Nelson Ortman, and Harold Ortman. The Company was originally organized in 1945 and manufactured machine

tools. About 1948 Ortman-Miller started manufacturing hydraulic cylinders and its business became very prosperous through the efforts of the sales agency operated by Miller, under the name of Midwest Supply Company. He and his sales organization sold a large amount of products of Ortman-Miller. Miller was president of Ortman-Miller and on November 1, 1950 employed the appellee, Cuthill, as a bookkeeper for Ortman-Miller and Midwest. In March, 1952, Miller was removed as president of Ortman-Miller by the other directors who were stockholders, and Ortman-Miller started selling its products direct to its customers and bypassed Midwest. Miller filed suit in Lake Circuit Court of Indiana in March, 1952 against the other stockholders and Straley Thorpe who was employed as counsel for Ortman-Miller. This suit was based on malicious destruction and appropriation of Miller's Midwest Supply Company. The case was venued to Jasper Circuit Court for trial and judgment was entered against Miller. The Appellate Court of Indiana affirmed the trial court in *Miller* v. *Ortman,* ..... Ind. App. ..... (February, 1955), 124 N.E. 2d 390, rehearing denied, 125 N.E. 2d 257. The Supreme Court of Indiana reversed the Appellate Court and remanded the case for trial. ..... Ind. ..... (July, 1956), 136 N.E. 2d 17.

(Page 4)

Miller's counsel devoted a great deal of their printed argument to the reversal of this case by the Supreme Court of Indiana, and the acts and doings of the other stockholders and Thorpe in usurping the business of Midwest. The Indiana case is not vital to the question here involved as to whether Cuthill had a valid claim for overtime. Appellant's contention that the district court relied upon the Indiana Appellate Court's decision as decisive in this case

is rejected by the statement of the trial court in its opinion as follows:

> "Those findings, however, do not allude to any of the activities of Cuthill in relation to the ousting of Miller and the acquisition of Midwest's business by Ortman-Miller. These matters were raised for the first time during this hearing."

Cuthill's employment by Ortman-Miller ended in February, 1953. He claimed that he had worked many hours of overtime from February, 1951 through January, 1952. Harney, the external auditor for Ortman-Miller, was changing the accounting system of the company by recasting the books to reflect the business from an accrual basis instead of a cash basis, and doing other accounting work for Ortman-Miller. Commencing in February, 1951 this work was required in connection with Ortman-Miller's income tax returns. Miller himself testified that he requested Cuthill to assist Harney in this work. Harney and Cuthill both testified that Cuthill worked in Harney's office in connection with work for Ortman-Miller on evenings and week ends, averaging at least 30 hours per week. Miller in his testimony stated further that Cuthill worked on the premises of Ortman-Miller and Midwest 40 hours per week during this period. Another employee of Ortman-Miller had obtained additional pay for overtime. Cuthill contacted an official of the Wage and Hour Board in Gary, Indiana, in January, 1953. He also spoke to Thorpe and Harney and requested pay for his overtime. In March, 1953 after his connection with Ortman-Miller was severed he consulted Mr. Lee Burkey, a practicing attorney in Chicago, who had formerly been employed as an attorney by the United States Department of Labor in the Wage and Hour Division. Burkey requested Cuthill to furnish a rec-

ord of his overtime and Cuthill brought a tabulation from his original notes which were later lost. When the hours

(Page 5)

were added by Burkey the memorandum disclosed a total of 1211. Later Burkey advised Cuthill that the two year statute of limitation (as provided by 29 U.S.C.A. §255) was running on his hours of overtime, and received authorization to sue. This suit was filed June 2, 1953 alleging a claim for overtime for each workweek between June 3, 1951 and January 11, 1952, and asked judgment for overtime, liquidated damages, attorney's fees and costs. Answer was filed by Ortman-Miller denying liability.

Mr. Joseph P. Sullivan, an attorney from Whiting, Indiana, was employed by Burkey as local counsel when the suit was filed. Mr. James J. Richards entered the case with Thorpe as attorney for Ortman-Miller. In October, Richards contacted Burkey in Chicago to determine the amount claimed. In November, 1953 Burkey wrote a letter to Richards in which he offered to accept in settlement $5,295.72, which consisted of $3,953.75, for all overtime, including the hours barred by the statute of limitations, $1,372.92 for attorney's fees, $24.05 costs, and omitting any damages. Cuthill's hourly pay for the first part of his employment, based upon a 40 hour week, was $1.875 per hour and later $2.1875 per hour. During the period claimed in the suit his hourly pay was $2.1875 or $3.28 for overtime. In all, Cuthill claimed 893½ hours of overtime which were not barred by the statute of limitations and this amounted to $2,930.63 without damages. Negotiations continued and about a week before December 21, 1953 Sullivan and Burkey met with Thorpe and Richards in Hammond, Indiana, and the controversy was finally settled and compromised for the sum of $4,100.00. Burkey,

Sullivan and Thorpe testified to all of the discussions which occurred at the settlement meeting. The district court on its own initiative, without objection, called Sullivan as a witness and admonished the parties not to speak to Sullivan until he appeared in court. In the examination by the trial court Sullivan described a heated discussion between counsel prior to reaching a settlement. Appellant maintains that the settlement was a sham transaction. However, he admits that Sullivan was not connected with the fraud in any way. He cross examined Sullivan and there is nothing in his evidence that in the slightest way would indicate that there was any artifice or connivance practiced by anyone in reaching the settlement. This court

(Page 6)

can find no evidence that would indicate in the slightest degree that the settlement was not legitimate.

On December 21, 1953, Cuthill with his attorneys, Burkey and Sullivan, and Ortman-Miller with its attorneys, Thorpe and Richards, appeared in the United States District Court. Before Cuthill testified Thorpe made the following statement:

> "I would like to say this, your Honor: This Company has been confronted with numerous lawsuits, with some pretty bad charges, and I am confronted with a situation where I just can't stipulate the facts. I can go along with this; I want this man to be paid; and I can determine pretty well what the amount is. I should like, if it is not asking too much, that the record should show that there was evidence heard and that the Court made a finding on this; if it is not asking too much, I should like that, because I might be confronted somewhere with the statement that I had agreed to this judgment. I would rather, if we could, do it that way, if it is not an imposition upon your Honor."

(Appendix)

The court after hearing the evidence entered a judgment for $4,100.00. On the next day Miller filed this intervening petition. Appellant attributes to Thorpe's statement a fraudulent intent to pay Cuthill. While Thorpe's statement was inept there is nothing in it to indicate that he was acting fraudulently when it is considered in the light of the settlement negotiations and the other evidence above related.

The district court correctly decided the true issue in this case. The court's opinion stated:

> "Having in mind the facts and charges surrounding the dispute between Miller and the other parties connected with Ortman-Miller at the time Cuthill filed his complaint in this court, a determination of the major issue raised by the intervenor's petition will be made: were there any fraudulent misrepresentations made to this court? It is evident that the intervenor's right to have the judgment set aside under Rule 60(b) must lie in the determination of whether he has shown any such misrepresentation."
>
> *(Page 7)*
>
> "As discussed previously, one of these alleged misrepresentations was that Cuthill had a valid claim for overtime compensation. The facts relating to the type of work performed by Cuthill and as to how the claim for overtime hours was made, have already been related. These facts were testified to by Cuthill, Harney, Thorpe and Burkey. Significantly, the intervenor offered no evidence to refute the petitioner's claim of the overtime hours worked, and Miller himself testified that he believed Cuthill performed extra work under Harney's supervision.
>
> • • •
>
> "The decision which I am confronted with on this issue is not whether the court would find for Cuthill were his claim relitigated, but whether he misrepre-

> sented to this court the fact that he had a claim for overtime compensation, and whether the corporation or its attorney participated in a fraud by knowingly refusing to raise a defense which it or he believed could have prevented a recovery. Under all the facts and the legal principles just reviewed I cannot find that there were any such misrepresentations made to this court by Cuthill or his counsel; nor, can I find that either the corporation or its attorney participated in a fraud by failing to defend the claim any more than was done."

Counsel for appellant maintain the allegations of fraud were proved but the trial court refused to recognize circumstantial evidence. The burden of proof rested upon the appellant. *Assmann* v. *Fleming*, 159 F. 2d 332 (C.A. 8, 1947); *Parker* v. *Checker Taxi Company*, 238 F. 2d 241 (C.A. 7, 1956), cert. denied 353 U.S. 922. The trial court stated:

> "There is no direct evidence of fraud before this court on any of the charges made by the intervenor, and the proof of any inference or charge lies in the credulity of the series of events as asserted by Miller."

Circumstantial evidence is probative evidence. The district court did consider all the evidence and determined that the direct evidence outweighed any inference from any circumstance in evidence upon which there might have been an inference of fraud. It was the duty of the trial court to weigh the evidence and determine the credibility of the witnesses.

(Page 8)

From a careful review of all the facts and circumstances before the trial court it must be concluded that there was substantial evidence to support the findings of fact by the district court. The refusal to vacate the judgment and

permit a defense to be made was not an abuse of discretion. *Assmann* v. *Fleming, supra.*

The cases relied upon in appellant's brief and argument involve facts not applicable here. We have omitted a discussion of each case since it would serve no purpose other than to lengthen this opinion.

THEREFORE, the order of the district court is

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
* * (No. 11985) * *

Independent application and petition of J. Carter Miller to vacate Opinion and decision of October 16, 1957 because of (1) collusion between plaintiff Scott Cuthill and former defendant's attorney, Straley Thorpe, and (2) fraud practiced upon this court.

Comes now J. Carter Miller and respectfully represents to the Court as follows:

(1) Your petitioner, J. Carter Miller, is the plaintiff in Cause No. 33-52, Jasper Circuit Court, Jasper County, Indiana. These proceedings are described in the above captioned cause and in the dissenting opinion of Judge Bowen of the Indiana Appellate Court in the case of *Miller* v. *Ortman, et al.*, ... Ind. App. .....; 124 N.E. 2d 390; 125 N.E. 2d 257; and the opinion of the Supreme Court of Indiana in the case of *Miller* v. *Ortman*, ... Ind. .....; 136 N.E. 2d 17. In addition, petitioner is the cross-complainant in a damage action pending in the Jasper Circuit Court under Cause No. 43-52 entitled *Ortman-Miller Machine Company* v. *Miller*. Certified copies of the pleadings in these actions were introduced in evidence in the District Court and constitute part of the record on appeal in the above captioned proceedings. They are identified as Intervenor's Exhibits 12 and 35 of the record on appeal in the above proceedings. One Straley Thorpe, former attorney for the defendant Ortman-Miller Machine Company in these proceedings, is a party defendant in

Cause No. 33-52, supra. Likewise, attorney Straley Thorpe, as well as one Clarence H. Harney, an attorney and associate of Straley Thorpe, are cross-defendants in Cause No. 43-52, supra. The actions involve substantial damages alleged to have accrued in petitioner Miller's favor by virtue of a malicious conspiracy to destroy and appropriate a valuable distributorship business, Midwest Supply Company. Plaintiff Scott Cuthill, former office manager of Midwest Supply Company, is a key witness in both of the state court actions hereinabove described. In addition, your petitioner and applicant, J. Carter Miller, is the owner of one-fifth of the corporate stock in the defendant Ortman-Miller Machine Company. He has a direct financial interest in $4100.00 paid into the office of the Clerk of the United States District Court on December 21, 1953 in payment of the judgment entered in plaintiff Scott Cuthill's favor on that date. The proceeds of the judgment were represented by a check drawn in favor of the Clerk of the United States District Court on the bank account of the defendant Ortman-Miller Machine Company.

Necessity for Filing Petition and Application.

(2) Your petitioner, J. Carter Miller, is not a party to these proceedings. He filed an application to intervene as a party on December 22, 1953. This application was based upon his rights as a stockholder of the defendant corporation and the fact that no defense was made by the corporation's attorney, Straley Thorpe, when Cuthill's cause of action was submitted for trial the day before, i.e., December 21, 1953. Your petitioner's original application to become a party was stricken by the District Court, on

motion of the plaintiff, on January 28, 1954. His Amended Petition for Leave to Intervene was stricken the second time on April 15, 1954. Following the introduction of evidence in support of his amended petition, the District Court denied his application to become a party for the third time on August 29, 1955. The action of the District Court was affirmed by decision and opinion of this Honorable Court entered on October 16, 1957.

(3) Your petitioner further represents that, in addition to his unsuccessful attempts to become a party through intervention, he has been unsuccessful in his attempts to vacate the judgment entered by the District Court in favor of the plaintiff Scott Cuthill on December 21, 1953. Although your petitioner was precluded from defending against the claim of plaintiff Scott Cuthill by the judgment of December 21, 1953 and the merits of Cuthill's claim were not in issue in the proceedings to intervene and vacate the judgment, both the findings and decision of the District Court entered on August 29, 1955, and the decision and opinion of this Honorable Court, rendered on October 16, 1957, recite evidence allegedly received by the District Court on the merits of Cuthill's claim. Because of the matters hereinafter alleged, and because of the status of the issues, your petitioner was precluded from introducing material evidence on the merits of the claim. The opinion and decision of October 16, 1957, is erroneously predicated upon a determination of whether or not the record contains sufficient evidence to support the findings of the District Court. This question was not the question raised by your petitioner on appeal. The findings and decision of the District Court are predicated on matters that were not in issue. The District Court failed to decide the issue shown by the pleadings. These

matters are pointed out in a petition for rehearing filed on October 31, 1957. They are set forth in this petition for the purpose of demonstrating that the matters herein alleged are extrinsic and outside of the issues determined by the District Court on October 29, 1955 and by this Court on October 16, 1957.

Jurisdiction to Entertain this Petition and Application.

(4) Your petitioner respectfully represents that this petition is predicated upon the inherent jurisdiction of this Court to investigate into and eradicate a fraud practiced upon the court. Such jurisdiction was recognized by the United States Supreme Court in the case of *Hazel-Atlas Glass Company* v. *Hartford Empire Company*, (1944) 322 U.S. 772, 64 S. Ct. 1281. In the *Hazel-Atlas Glass Company* case, a decision in favor of an appellee-plaintiff was ordered vacated and a mandate issued to the District Court directing the District Court to vacate and set aside a judgment previously entered in favor of the plaintiff. The jurisdiction of the Court of Appeals to entertain an independent application is likewise recognized by the precedents established in *Root Refining Co.* v. *Universal Oil Products Co.*, (1945) 147 F. 2d 259 and *Universal Oil Products Co.* v. *Root Refining Co.*, (1946) 328 U.S. 575; 66 S. Ct. 1176. Further, the inherent jurisdiction of this Honorable Court to entertain an independent application to investigate the collusive nature of a proceedings, resulting in an opinion and decision in favor of one of the colluding parties, is recognized in the case of *United States* v. *Johnson*, (1943) 319 U.S. 302; 63 S. Ct. 1075.

(5) Your petitioner respectfully represents further that this Honorable Court still retains jurisdiction over the

parties and the subject matter of the judgment rendered by the United States District Court on December 21, 1953, by virtue of the fact that the proceedings in this court are still in fieri. The opinion and decision of this court were rendered on October 16, 1957 in Cause No. 11985. A petition for rehearing was filed by intervenor-appellant J. Carter Miller, as a stockholder of Ortman-Miller Machine Company, on October 31, 1957. Until the petition for rehearing is denied or overruled this Court has the judicial power of review over the proceedings as well as inherent power to investigate into and purge its records of fraud practiced upon this Court and the District Court.

Collusive Nature of the Proceedings.

(6) Your petitioner respectfully represents that, as a party plaintiff in the Jasper Circuit Court in Cause No. 33-52, and as the cross-complainant in Cause No. 43-52, it is of vital concern to him that Scott Cuthill, a key witness in those proceedings, is not rewarded by the proceeds of the judgment entered in his favor on December 21, 1953. Cuthill is the only independent witness (exclusive of the parties) with intimate knowledge of the facts and circumstances involved in the conspiracy. As previously mentioned, attorney Straley Thorpe and attorney-accountant Clarence Harney are adverse parties in the state court proceedings. Straley Thorpe has already received $81,000 from the corporate treasury of Ortman-Miller Machine Company as his reward for his part in the conspiracy to destroy and appropriate Midwest Supply Company. Clarence Harney, similarly, has received a minimum of $23,650.00.

(Appendix)

The receipt of $23,650.00 by Clarence Harney (as remuneration for revising the tax returns of Ortman-Miller Machine Company) is admitted in the record in the appeal. The amount which Straley Thorpe had procured, or $81,000, was unknown by Miller at the time this case was argued on September 16, 1957. He received accurate information on this subject following the oral argument. As the record indicates, the $4100.00 paid by Thorpe into the office of the Clerk in satisfaction of Cuthill's judgment against Ortman-Miller was based on alleged overtime performed by Cuthill in Harney's office, in Harney's presence, in connection with the work done by Harney in revising the method of reporting Ortman-Miller's income tax. Clarence Harney and plaintiff Scott Cuthill, consequently, are the only persons who are or were in a position to know whether Cuthill actually performed overtime work or not and if so, how much overtime, if, any, he actually performed. Attorney Straley Thorpe, who represented Ortman-Miller Machine Company up to the time the motion for new trial was overruled by the District Court in November, 1956 was intimately associated with Clarence Harney and Scott Cuthill in the conspiracy to destroy and appropriate Midwest Supply Company.

(7) Your petitioner respectfully represents further that the proceedings involved in Cause No. 11985 are collusive and that the decision and opinion of this Court rendered on October 16, 1957 are the result of collusion between the plaintiff Scott Cuthill and the defendant's attorney, Straley Thorpe, and the defendant's witness Clarence Harney. The records in this cause conclusively demonstrate that Thorpe and Harney conceived the idea of filing a Fair Labor Standards Act case and induced Scott Cuthill, a key witness in the proceedings against them,

to go to Chicago to get a lawyer, have the lawyer file a complaint, come in and testify under oath, and obtain a judgment against Ortman-Miller Machine, which would be represented in the proceedings by Thorpe. (Cuthill's attorneys, Burkey and Sullivan, were ignorant of the collusive plan and scheme until after the judgment was entered on December 21, 1953.) The fact that Thorpe conceived the idea of Cuthill filing a suit against Ortman-Miller and ultimately testifying under oath in the District Court is shown by an excerpt from the transcript of the testimony of Cuthill elicited on cross examination by Thorpe and attached hereto as Exhibit "C". After Cuthill had filed the claim, through attorney Lee M. Burkey, and when the cause was submitted to the District Court, Cuthill came in and testified under oath *exactly as Thorpe had instructed him to do* before Cuthill even went to see Burkey in March of 1953. The transcript of the proceedings before the District Court on December 21, 1953 shows that Thorpe, purportedly acting on behalf of the defendant, did not cross examine Cuthill or offer any evidence opposing his claim. Transcript of record in Cause No. 11184, pages 10 through 18. Thorpe procured a check in the amount of $4100.00 plus an item for court costs. He also prepared the form of judgment to be entered, on contested issues, in Cuthill's favor. After arranging for the institution of the suit, the failure to defend, and the production of the fruits of the scheme, Thorpe and Harney successfully joined with the plaintiff's counsel, Lee M. Burkey, in preventing the judgment from being set aside. The record shows that Harney was the only witness offered by either Cuthill or defendant Ortman-Miller at the hearing on intervenor's application to vacate the judgment. In both appeals, the corporation's attorneys joined with

appellee Cuthill in urging that the judgment in Cuthill's favor be protected. The initial collusion between Cuthill, Thorpe and Harney, which preceded the institution of the proceedings by Burkey on January 3, 1953, continued throughout the unsuccessful attempts by Miller to intervene and obtain relief from the judgment. Even though Straley Thorpe and Clarence Harney ceased to act for Ortman-Miller Machine Company after April of 1956, the new attorneys for Ortman-Miller Machine Company adopted Thorpe's position in the appeal which was decided on October 16, 1957.

By virtue of the above and foregoing facts, it is apparent that plaintiff Scott Cuthill and the defendant were never adversary parties in the Federal Court litigation. The jurisdiction of the United States District Court was fraudulently invoked by Scott Cuthill at the instance of Straley Thorpe who, by his own admissions, insisted upon a record that would conceal any suggestion that he, Thorpe, had agreed with Cuthill, through stipulation or otherwise, on the circumstances under which Cuthill was receiving $4100.00.

Perpetration of Fraud Upon this Court.

(8) The evidence recited in the opinion of this Honorable Court is based upon a fraudulently prepared document. Your petitioner has attached hereto, as Exhibit "A", the photostatic copy of three pages of notations drawn up by Cuthill in Harney's office shortly prior to the filing of the complaint in June of 1953. This document was copied from an insurance calendar in Harney's office. It was then turned over to Lee M. Burkey for the purpose of enabling Mr. Burkey to file a complaint for overtime. The notations were subsequently used by Mr. Burkey

when he wrote to Mr. Thorpe on November 12, 1953, describing the amount of money, by mathematical computation, which Cuthill had coming under the complaint.

(9) Your petitioner respectfully represents that this document is patently fraudulent. An examination of it reveals that Cuthill fabricated the hours shown. The document shows that included on the paper are hours allegedly worked as overtime when the plant was closed. By referring to Exhibit "B", a calendar, it is apparent that his overtime notations included May 30th, a Wednesday, July 4th, a Wednesday, and September 3rd, a Monday, all legal holidays when the plant was closed. Page 3 of the document contains notations taken from Harney's statement for services rendered under date of August 29, 1951 for which Harney was paid $1150.00 in full. Further, the document contains "overtime" for the period of March 18th through March 23rd before Harney was even hired as external auditor.

(10) The fraudulently prepared document enabled attorney Burkey to draw up and file a complaint. It gave Thorpe, after the letter of November 12, 1953, the basis for fixing the amount of money which Cuthill was to get under his previous arrangement with Thorpe. When Thorpe cross-examined Cuthill, as a fictitious adversary, the document became substantiated by Cuthill's oral testimony. Likewise when Thorpe offered Harney as a witness on Friday, March 4, 1955, the document offered a basis for Harney's testimony. Through the collusive efforts of Thorpe, Harney and Cuthill, the matters appearing on Exhibit "A" have become the factual basis for this Honorable Court's opinion of October 16, 1957.

(Appendix)

Exhibit "A" conclusively demonstrates that Cuthill has perpetrated a fraud on this Court through the initial fabrication of the document.

Wherefore, your petitioner prays that plaintiff-appellee Scott Cuthill and defendant-appellee Ortman-Miller Machine Company be ordered to file answer to this petition; that a commissioner or master be appointed to hear evidence on the issues formed; that the Commissioner, or Master, report, in writing, his findings on the alleged collusive nature of the litigation and the alleged perpetration of a fraud; that the costs incurred be taxed either against your petitioner Miller or appellees Cuthill and Ortman-Miller Machine Company; and that the opinion and decision of October 16, 1957, be vacated and set aside with directions to the District Court to vacate the decision and judgment of August 29, 1955.

J. Carter Miller -- Petitioner
By /s/ Benjamin Wham
/s/ Owen W. Crumpacker
His Attorneys

(Appendix)

State of Indiana
County of Lake—ss.

Verification.

I, J. Carter Miller, being first duly sworn upon my oath, do depose and say: That I am the Petitioner in the above and foregoing petition; that I have read the same and am familiar with the facts therein set forth; that the facts alleged are true both in substance and in fact; that Exhibit "A" is a true and correct reproduction of the photostatic copy of the notations furnished by Scott Cuthill to Attorney Lee M. Burkey shortly prior to January 3, 1953; that Exhibit "B" is a true and correct reproduction of a 1951 calendar; and that Exhibit "C" attached to the Petition is a true and correct copy of the transcript of the record of a portion of the testimony of Scott Cuthill on cross-examination by Straley Thorpe in the United States District Court on or about Wednesday, April 2, 1955;

And further your affiant saith not.

(Signed) J. Carter Miller

Subscribed and sworn to before me this 4th day of November, 1957.
(Seal)

/s/ Lowell E. Enslen
Notary Public

My commission expires:
11/9/58

(Appendix)

(EXHIBIT "A").

Jan. 19, 51

$3927.00 due for o'time.

O'time Rate if paid for 40 hrs. salary of 87.50 is 3.28 per hr.

Total of 1197½ hours overtime.

Per wk. $75.00		Per wk. 87.50	
			31 — 6
March	1	April	1 — 8
	2		2 — 4½
	3		3 — 4½
	4		4 — 4½
	5		5 — 4½
	6		6 — 4½
	7		7 — 6
	8		———
	9		81½ hrs.
	10		
	11		8 — 6
	12		9 G
	13		10 G
	14		11 — 4½
	15		12 — 4½
	16 G		13 G
	17 G		14 — 6
	18 — 8		15 — 8
	19 — 4		16 — 4½
	20 G		17 — 4½
	21 — 4½		18 — 4½
	22 — 4½		19 — 4½
	23 — 4½		20 G
	24 G		21 — 6
	25 G		22 — 8
	26 G		23 — 4½
	27 G		24 — 4½
	28 — 4½		25 G
	29 — 4½		26 — 4½
	30 — 4½		

(Appendix)

27 G
28 — 6
29 — 8
30 G
May 1 — 4½
2 — 4½
3 — 4½

4 G
5 — 6
6 — 8
7 — 4½
8 G
9 G
10 — 4½

11 — 4½
12 — 6
13 — 8
14 — 4½
15 G
16 — 4½
17 — 4½

18 G
19 — 6
20 — 8
21 G
22 — 4½

175½

23 — 4½
24 — 4½
25 G
26 — 6
27 — 8
28 — 4½
29 G
30 — 4½
31 — 4½

June 1 — 4½
2 — 6
3 — 8
4 — 4½
5 — 4½
6 — 4½
7 G

8 G
9 — 6
10 — 8
11 — 4½
12 ½ 4½
13 — 4½
14 — 4½

15 G
16 — 6
17 — 8
18 — 3
19 — 4½
20 — 4½
21 — 4½

22 G
23 ½ 4
24 — 8
25 — 4½
26 — 4½
27 G
28 — 4½

29 G
30 — 6
July 1 — 8
2 — 4½
3 G —
4 — 4½
5 — 4½

6 G —

184

7 — 6
8 — 8
9 — 4½
10 G
11 — 4½
12 — 4½
13 G
14 — 6
15 — 8
16 — 4½
17 — 4½
18 G
19 — 4½
20 — 4½
21 — 6
22 — 8
23 G
24 — 4½
25 — 4½
26 — 4½
27 — 4½
28 — 6
29 — 8
30 — 4½
31 — 4½

Aug. 1 — 4½
2 — 4½
3 G
4 — 6
5 — 8
6 — 4½
7 G
8 — 4½
9 — 4½
10 G
11 — 6
12 — 8
13 — 4½
14 G
15 — 4½
16 — 4½
17 — 4½
18 — 6
19 — 8
20 — 4½

201½

21 — 4½
22 G
23 — 4½
24 — 4½
25 — 6
26 — 8
27 — 4½
28 — 4½
29 — 4½
30 — 4½
31 — 4½

Sept. 1 — 6
2 — 8
3 — 4½
4 — 4½
5 — 4½
6 — 4½
7 — 4½
8 — 6
9 — 8
10 — 4½
11 — 4½
12 — 4½
13 — 4½
14 — 4½
15 — 6
16 — 8

(Appendix)

17 — 4½
18 — 4½
19 — 4½
20 — 4½

21 — 4½
22 — 6
23 — 8
24 — 4½
25 — 4½
26 — 4½
27 — 4½

28 — 4½
29 — 6
30 — 8
October 1 — 4½
2 — 4½
3 — 4½

223.50

4 — 4½

5 — 4½
6 — 6
7 — 8
8 — 4½
9 — 4½
10 — 4½
11 — 4½

12 — 4½
13 — 6
14 — 8
15 — 4½
16 — 4½
17 G
18 G

19 — 4½
20 — 6

21 — 8
22 — 4½
23 G
24 G

25 — 4½
26 — 4½
27 G
28 — 8
29 — 4½
30 — 4½
31 — 4½
November 1 — 4½

2 G
3 — 6
4 — 8
5 — 4½
6 — 4½
7 — 4½
8 — 4½

9 — 4½
10 — 6
11 — 8
12 — 4½
13 — 4½
14 — 4½
15 — 4½

16 — 4½

199.50

17 G
18 G
19 — 4½
20 — 4½
21 — 4½
22 — 4½

23 — 4½

(Appendix)

C M P
O P S—June 21 O P S workpapers & July 2
Receivables
Tax Audit

	24 G	14 — 4½
	25 G	15 — 6
	26 — 4½	16 —
	27 — 4½	17 — 4½
	28 — 4½	18 — 4½
	29 — 4½	19 — 4½
	30 — 4½	20 — 4½
December	1 — 6	21 — 4½
	2 — 6	22 G
	3 — 4½	23 G
	4 — 4½	24 —
	5 — 4½	25 —
	6 — 4½	26 —
	7 G	27 —
	8 — 6	28 —
	9 —	29 —
	10 — 4½	30 — 8:30 A.M.-
	11 — 4½	11:30 P.M.
	12 — 4½	———
	13 — 4½	132.00

(Appendix)

(EXHIBIT "B").

1951

JANUARY

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

FEBRUARY

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28			

MARCH

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

APRIL

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

MAY

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

JUNE

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

JULY

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

AUGUST

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

SEPTEMBER

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

OCTOBER

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

NOVEMBER

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

DECEMBER

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

(EXHIBIT "C").

Excerpt of Cross-Examination of Cuthill by Thorpe in The District Court on Wednesday, April 2, 1955.

Cuthill-cross

Q. That you would like to have it paid. I will ask you further if you didn't tell me that you felt that if I should tell the men down at the Ortman-Miller Machine Company to pay this claim that it would be paid. Do you recall telling me that?

A. No. It is possible that I did, though; it has been some time ago.

Q. Do you recall now that I asked you if you knew whether there were any records down at Ortman-Miller Machine Company concerning this overtime?

A. Yes, I believe you did.

Q. I will ask you further if I didn't tell you that I had been informed that there had been no records kept of any overtime for you in the company; do you recall that I made that statement to you?

A. Yes.

Q. And do you further recall that I said that so far as I could discover Mr. Harney had kept no overtime for you; do you recall that?

A. You said them both at the same time, neither one had kept any records.

Q. Do you recall further that I told you that under those circumstances I would not be able to tell anybody to pay you any overtime, that *you would have to bring a lawsuit against the company and prove your claim: isn't that right, isn't that what I told you?*

A. I thought you said to bring it against Ortman-Miller and J. Carter Miller and Harney, if I remember, not just Ortman-Miller Machine Company.

Q. Well, I told you that you would have to file a lawsuit, didn't I?

A. Yes, that's right.

Q. And that I further told you that the thing for you to do was to bring the suit against Ortman-Miller, J. Carter Miller, and Harney; I told you that, didn't I?

A. Yes.

Q. Let them get out of it the best way they could; isn't that what I told you?

A. Something to that effect.

Q. Now, didn't I further tell you that since apparently the only records of overtime that I could find were in existence were your own that *I expected you to go on the stand and swear to this time*; didn't I tell you that; that was the reason I was insisting that you file a suit?

A. Yes, that could have come up in the conversation, I am fairly sure, when you explain it.

Q. Do you now recall that I told you that *I expected you to swear to this time some place along the line*, and that's the reason I insisted you would have to file a lawsuit; isn't that what I told you?

A. Yes, I believe you did.

Q. And you did go out and you filed suit against the company, didn't you?

A. Well, I contacted Mr. Burkey.

(Transcript, Vol. 1 pages 350-352)

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, November 18, 1957

Before
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Casper Platt, District Judge

No. 11985

Scott Cuthill,
Plaintiff-Appellee,
vs.

Ortman-Miller Machine Corp.,
Defendant-Appellee,
and

J. Carter Miller,
Intervenor-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Petitions for rehearing and oral argument filed in the above cause be, and the same are hereby, denied.

Owen W. Crumpacker, Esq. handed the Clerk of this Court certain papers captioned "Independent Application And Petition of J. Carter Miller To Vacate Opinion And Decision Of October 16, 1957 Because of (1) Collusion Between Plaintiff Scott Cuthill and Former Defendant's Attorney, Straley Thorpe, And (2) Fraud Practiced Upon This Court." Treating these as a petition for leave to file the same in this Court, we hereby deny such leave.